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2. The respondent exercised the power of eminent domain and under Penn-

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sylvania law only a common carrier can exercise that power.

3. Pennsylvania law gave the public the right to use these railroad facilities and such right to use the facilities makes the respondent a common carrier.

C. The General Electric Company's railroad carried merchandise belonging to others.

D. The fact that the General Electric Company did not incorporate its railroad as such should not enable it to avoid its responsibility under the Federal Employers' Liability Act.

II. The District Court and the Court of Appeals erroneously gave Res Adjudicata effect to an Interstate Commerce Commission decision in direct conflict with a previous decision by this same Court of Appeals and a decision by this Court.

III. Petitioner by the summary action of the District Court and the Court of Appeals has been deprived of his right to trial by jury.

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IN THE

SUPREME COURT OF THE UNITED STATES.

Term No.

WILLIAM KELLY,
Petitioner,

vs.

GENERAL ELECTRIC COMPANY,
Respondent.

PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF SUPREME COURT OF THE UNITED STATES:

William Kelly, by his attorneys, prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Third Circuit entered in the above entitled case on June 24, 1953.

OPINIONS BELOW.

The opinion of the United States District Court for the Eastern District of Pennsylvania is reported in 110 F. Supp. 4 (U. S. E. D. Pa. 1953). The opinion of the United States Court of Appeals for the Third Circuit is reported in 204 F. 2d 692 (C. A. 3, 1953).

JURISDICTION.

The order of the Court of Appeals for the Third Circuit was entered on June 24, 1953. The jurisdiction of this Court is invoked under C. 646, Act of June 25, 1948, 62 Stat. 928, 28 U. S. C. A., Section 1254(1).

QUESTIONS PRESENTED.

1. Where a corporation owns railroad tracks and operates engines and freight cars owned by it over such tracks, and over the tracks of the Pennsylvania Railroad, hauling not only its own goods, but goods of other shippers and has safety rules for its own railroad men who operate such engines and freight cars and those who maintain the tracks, and where the corporation places such tracks over a public street in the City of Philadelphia, Commonwealth of Pennsylvania, is not such corporation in the operation of its railroad a common carrier under the Federal Employers'

Liability Act (45 U. S. C. A. 51, et seq.), so that it is responsible to a railroad worker employed by it who loses an arm and a leg as a result of the negligence of a fellow employee?

2. Where a corporation is organized and operated under the Constitution of the Commonwealth of Pennsylvania is it not bound by such Constitution, and where such Constitution makes such corporation a common carrier is it not a common carrier under the Federal Employers' Liability Act (45 U. S. C. A. 51, et seq.)?

3. Is not the decision in this case in direct conflict with the opinion of the same Court of Appeals (Third Circuit) in *Kach v. Monessen Southwestern R. R.*, 151 F. 2d 400 (C. A. 3, 1943)?

4. Is not the holding in this case a deprivation of petitioner's right to trial by jury under the Seventh Amendment to the Constitution of the United States?

STATUTE INVOLVED.

Federal Employers' Liability Act, Act of April 22, 1908, C. 149, Sec. 1, 35 Stat. 65, as amended by the Act of August 11, 1939, C. 685, Sec. 1, 53 Stat. 1404, 45 U. S. C. A., Sec. 51, et seq.

STATEMENT OF FACTS.

This is an action under the Federal Employers' Liability Act, 45 U. S. C. A., Sec. 51, et seq., to recover for amputation of plaintiff's left arm and leg and other personal injuries sustained by him when he was run down by a switch engine owned by the defendant General Electric Company on railroad tracks near the General Electric plant in Southwest Philadelphia. At the time of the accident plaintiff was paid by the General Electric Company and this action was commenced on the theory that at the time and place of the accident General Electric was engaged in Interstate Commerce as a common carrier by railroad. The General Electric Company at the time of the accident owned and operated railroad trains over its tracks at the scene of the accident. Plaintiff was, for the purpose of this argument, admittedly an employee of General Electric.

General Electric Company in this particular location owns 2.17 miles of trackage, has two engines, nine freight cars, and four box cars which are used in this area (R. 14a, 15a, 45a, 49a). These engines, cars and tracks are used not only to transport equipment owned or consigned to the General Electric Company but also carry within incoming shipments cars which have only part of their load consigned to them. *Thus, the remaining portion of the car contains goods of other consignees* (R. 96a, 113a). Most of the material shipped from the General Electric plant is shipped F. O. B. their plant (109a, 110a, 111a). The locomotives of the General Electric Company's railroad moved on the tracks of the Pennsylvania Railroad and pulled cars from the tracks of this admitted common carrier to various places in their plant (R. 103a). In addition, the railroad of the General Electric Company operates under a pre-

scribed set of rules of safety promulgated by persons familiar with railroad work (R. 123a).

The petitioner also produced evidence that under an agreement between the General Electric Company and the Pennsylvania Railroad dated May 14, 1925, paragraph third (R. 133a), the General Electric Company in the operation of its railroad agreed to conform, as a railroad must, with the requirements of the rules and regulations of the Interstate Commerce Commission with respect to the construction, maintenance and operation of the subject tracks.

The General Electric Company also was permitted to construct its railroad across the city streets in the City of Philadelphia. This it could not do under Pennsylvania law unless it was a common carrier.

This matter comes before your Honorable Court when under these facts the District Court held that the respondent was not a common carrier and hence was entitled to summary judgment. The Court of Appeals for the Third Circuit affirmed such entry of judgment.

SPECIFICATION OF ERRORS TO BE URGED.

The Court of Appeals erred in the following respect:

In holding as a matter of law that the General Electric Company's railroad was not a common carrier within the meaning of the Federal Employers' Liability Act (45 U. S. C. A. 51).

REASONS URGED FOR GRANTING THE WRIT.

1. The United States Court of Appeals (Third Circuit) erroneously interpreted the meaning of the words "common carrier" in the Federal Employers' Liability Act (45 U. S. C. A. 51, et seq.).

2. The United States Court of Appeals, and the District Court for the Eastern District of Pennsylvania ignored the Constitution of the Commonwealth of Pennsylvania.

3. The decision is in conflict with the decision of the same Court of Appeals in *Kach v. Monessen Southwestern Ry.*, 151 F. 2d 400 (C. A. 3, 1943).

4. Petitioner by the decision of the Court of Appeals has been deprived of his right to a trial by jury under the Seventh Amendment to the Constitution of the United States.

5. No case of this Court has previously stated the factors necessary to make a railroad a "common carrier" within the provision of the Federal Employers' Liability Act (45 U. S. C. A. 51).

ARGUMENT.

I. UNDER THE CIRCUMSTANCES HERE INVOLVED THE GENERAL ELECTRIC COMPANY IS AS A MATTER OF LAW A "COMMON CARRIER" BY RAILROAD.

A. The General Electric Company operates a railroad.

There can be no doubt of the fact that the General Electric Company operates a railroad. That much had to be and was admitted by the respondent. It was forced to admit this because it owns at this location alone 2.17 miles of tracks; it owns and operates engines, freight cars and box cars over these tracks; the engineers, brakemen, flagmen, conductors and maintenance men which it employs are subject to specific safety rules prescribed by persons familiar with railroad activity. Faced with these factual circumstances, there is not and could not be any dispute that the respondent operated a railroad.

It is with specific reference to this railroad that the petitioner contends that the General Electric Company is a common carrier by railroad. Petitioner is *not contending* that the General Electric Company with all of its vast resources and operations is a common carrier. But, petitioner *is respectfully insisting that in its railroad operations* the General Electric Company is a common carrier.

In deciding this question the name of the respondent means nothing. The Pennsylvania Railroad would remain a common carrier even if its name should be changed to the Pennsylvania Electric Company. Therefore, the fact that the name of the respondent is the General Electric

Company is irrelevant to any consideration of its status as a common carrier.

B. The status of the respondent as a common carrier is to be determined by Pennsylvania law and under such law the respondent is a common carrier.

The case of *North Carolina Ry. Co. v. Zachary*, 232 U. S. 248 (1913), establishes the rule that the law of the place where the accident occurred governs the status of the defendant in Federal Employers' Liability cases. In that case this Court referred to North Carolina law and said (p. 258):

> "This being the legal situation under the local law, it seems to us that it must and does result, in the case before us, that the lessor is a 'common carrier by railroad engaging in commerce between states' and that the deceased was 'employed by such carrier in such commerce' within the meaning of the Federal act * * *."

See also *Stevenson v. Lake Terminal Ry. Co.*, 42 F. 2d 357 (C. C. A. 6th, 1930), where the Court at pages 359, 360 said:

> "Plaintiff also relies upon several sections of the Ohio General Code to support his contention that defendant was without authority to lease any of its equipment to a private corporation, and that therefore the leasing of defendant's engine and tracks was void and illegal for all purposes. Section 8684 of the Ohio General Code does prohibit the employment of corporate equipment 'for any other purpose than to accomplish the legitimate objects of its creation', but we cannot agree that this general stricture prevents, as 'illegal', the accommodation hiring out of an engine, not then employed by the railroad, or the granting of such per-

mission for the use of its tracks, as is here involved. Moreover, even an illegal lease of the equipment does not of itself make plaintiff pro hac vice the servant of the lessor. See Standard Oil Company v. Anderson, 212 U. S. 215, 221, 29 S. Ct. 252, 53 L. Ed. 480. *The lessor becomes liable only if the local law holds it responsible for the negligence of its lessee.* Cf. North Carolina R. R. Co. v. Zachary, 232 U. S. 248, 34 S. Ct. 305, 58 L. Ed. 591, Ann. Cas. 1914C, 159." (Emphasis supplied.)

Let us turn to Pennsylvania law.

1. *The Constitution of the Commonwealth of Pennsylvania makes the respondent a common carrier.*

The Constitution of the Commonwealth of Pennsylvania provides, Art. 17, Section 1:

> "All railroads and canals shall be public highways, and all railroad and canal companies shall be common carriers * * *."

This clear and unambiguous provision in the Constitution of the Commonwealth where the accident happened and where the defendant was incorporated was completely ignored by the District Court whose decision was affirmed Per Curiam by the Court of Appeals. It is respectfully submitted that the provisions of this Constitution make unanswerable the argument that the respondent was a common carrier by railroad as a matter of law.

The respondent operated a railroad. The Constitution of the state where the accident happened and where the respondent was incorporated makes *all* railroad companies common carriers; ergo, the respondent must, by engaging in railroading, undertake the obligations of a common carrier. Nothing could be clearer. Nothing could be more conclusive. Under the Constitution of this Commonwealth the respondent *must be a common carrier.*

2. *The respondent exercised the power of eminent domain and under Pennsylvania law only a common carrier can exercise that power.*

By the exercise of this power Pennsylvania law places the respondent in this case in a position where it cannot deny that it is a common carrier. Before the construction of the railroad tracks where this accident occurred, the Pennsylvania Railroad was given the right to lay the tracks across 68th Street—a public highway in the City of Philadelphia. The Pennsylvania railroad in turn, by lease gave this right to the General Electric Company. In constructing the railroad across the city street the General Electric Company was acting unlawfully unless it was a common carrier: *Barker, et al. v. Hartman Steel Co.*, 129 Pa. 551 (1889). Indeed, the legislature could not allow a private industrial corporation to encroach upon the public streets as such would be a taking of property for a private rather than a public purpose. *Ormsby Land Co. v. Pittsburgh*, 276 Pa. 68 (1923). Thus, the only type of corporation which can perform such act is a common carrier which has the power of eminent domain and which takes the property for a public purpose.

Following the effect of this situation through to its logical conclusion another proposition of law, not mentioned and not discussed by the District Court or the Court of Appeals, (although vigorously asserted by your petitioner), fits the factual circumstances and precludes the defendant from asserting that it was not operating as a common carrier. That proposition is: *If specific conduct, in one view, may be construed to be lawful, and in another to be unlawful, the lawful construction shall be adopted.* The force of this proposition is best illustrated by the Pennsylvania case of *Kissell v. Motor Age Transit Lines*, 357 Pa. 204 (1947). In that case a tractor-trailer was being driven along a highway and was involved in an accident. The only person holding an Inter-

state Commerce Commission permit was the owner of the trailer. The owner of the trailer attempted to assert that the owner of the tractor was an independent contractor. The court said that if such was so, the shipment was being made illegally and that in view of the above stated presumption of lawfulness such contention *could not be made. The court decided as a matter of law that the owner of the tractor was the agent of the owner of the trailer.* See also *Rosu v. Law,* 193 F. 2d 894, 899 (C. A. 3, 1952).

Applying the same reasoning to this case, General Electric Company constructed its railroad over a public highway. The only way that such action could be taken lawfully was if General Electric Company was a common carrier. It cannot now assert that it performed an illegal act and that it was not a common carrier.

3. *Pennsylvania law gave the public the right to use these railroad facilities and such right to use the facilities makes the respondent a common carrier.*

In *United States v. Louisiana & P. R. Co.,* 234 U. S. 1, 24, 34 S. Ct. 741, 746 (1913), where that Court said:

> "* * * The extent to which a railroad is in fact used does not determine the fact whether it is or is not a common carrier. It is the right of the public to use the road's facilities and to demand service of it, rather than the extent of its business, which is the real criterion determinative of its character. This principle has been frequently recognized in the decision of the courts."

With this as the basic test the question becomes, can the public use the railroad facilities owned by the General Electric Company. The answer is clearly in the affirmative. Article 17, Sec. 1, of the Constitution of the Commonwealth of Pennsylvania, provides:

"All railroads and canals shall be public highways and all railroad and canal companies shall be common carriers * * *."

In *Lehigh Nav. Coal Co. v. Pennsylvania Public Utility Commission, et al.*, 133 Pa. Superior Ct. 67 (1938), a mining company constructed a sidetrack connecting with the Pennsylvania Railroad. The Court held that such sidetrack was impressed with a public use. The Court said (p. 73):

"* * * The sidetrack which appellant built, when connected with the Pennsylvania railroad, constituted a part of the railroad's transportation facilities in the same manner *as if constructed by the railroad company itself.* The railroad's right of way and tracks are its private property, but subject to public use. Pennsylvania Railroad Co. v. Public Service Commission, 64 Pa. Superior Ct. 586, 589. *If some of these facilities constituting its transportation system are privately owned, they are none the less charged with public use, and subject to regulation by the state.* Sidetracks are among the works and appendages usual in the convenient operation of a railroad (Reeser v. Philadelphia & Reading Railway Co., 215 Pa. 136, 138, 64 A. 376); they are facilities of such utility, even though privately owned; when connected with the line of the railroad company they are an integral part of the railroad system, regardless of ownership, and, as provided by Artice 17, §1, of the Constitution of 1874, become public highways, and hence subject to regulation as such by the state." (Emphasis supplied.)

The people who own the property all along 68th Street (see Exhibit A, sheet 7) (138a) all have a right under the above provisions of the Constitution and the *Lehigh Nav. Coal Co.* case, supra, to tie into and use these facilities.

The District Court attempted to make a distinction between the tracks and other facilities but the fact remains

that all of the facilities become subject to a public use. It is not only the tracks which become subject to the public use, but all of the facilities owned by the company which are used in the operation of the railroad.

C. The General Electric Company's railroad carried merchandise belonging to others.

The engines, cars and tracks of the General Electric Company's railroad not only transported General Electric Company goods but also the goods of others. First, with respect to outgoing shipments, *all* of the goods shipped by them were the goods of others at the time they were shipped. All of the outgoing shipments were made F. O. B., the plant of the respondent. Thus, title to such goods passed to the buyers at the time of such shipment. Uniform Sales Act, §46; Act of May 19, 1915, P. L. 543, §6; (69 P. S., §256); *New York and Pennsylvania Co. v. Cunard Coal Co.*, 286 Pa. 72 (1926); *W. C. Downey & Co., Inc. v. Kraemer Hosiery Co.*, 136 Pa. Superior Ct. 553 (1941). These goods were therefore the property of *others* being transported by the employees of the respondent over its tracks by its engines, in its cars. Whether it charged for such service is irrelevant to the issue.

Indeed, the respondent transported some goods which it never owned, for in some instances cars come over the General Electric tracks which have only a portion of their load consigned to the respondent. The other half belongs to some other consignee. So far as these goods are concerned they are, when they come in, the goods of others and they remain the goods of others when they come out. They never belong to the General Electric Company.

As a matter of fact this shipping of other persons' goods was an element lacking in the case of *Kach v. Monessen Southwestern Ry. Co.*, 151 F. 2d 400 (C. A. 3, 1945), and nonetheless this same Court of Appeals held the defendant

to be responsible under the Federal Employers' Liability Act. The Court said (p. 401):

> "The evidence discloses that the defendant receives cars loaded with raw materials consigned to the Steel Company from the two connecting railroads and places them at the appropriate points in the works of the Steel Company. It also receives from the Steel Company cars loaded with the manufactured product of that company and moves them from the points of loading to points of connection with the connecting railroads. The defendant, however, does not publish tariffs of any kind, does not issue bills of lading, its name does not appear on any of the bills of lading covering the inbound shipments received from the connecting railroads and it does not participate in any of the freight rates covering the materials transported by those railroads."

It is extremely significant to note the striking similarity between the facts of that case and the facts of this case. And yet in the *Kach* case this same Court of Appeals decided that the Monessen Southwestern Ry. Co. (a wholly owned steel company railroad) was subject to the Federal Employers' Liability Act, while in this case it decided that General Electric Company, by failing to incorporate its railroad, could dodge the responsibility of this Federal act. The respondent here should be made responsible under the Federal Employers' Liability Act just as the Conemaugh & Black Lick R. R. which operates on behalf of the Bethlehem Steel Company and, the Monessen Southwestern Ry. Co. which operated on behalf of the Pittsburgh Steel Company must bear their obligations under the Federal Employers' Liability Act.

It is true that in the *Kach* case the railroad there involved admitted that it was a common carrier, but implicit in that decision must be a holding that it was a common carrier. The Federal Court could only have had jurisdiction by

virtue of the Federal Employers' Liability Act. There was no diversity of citizenship and a defendant cannot admit Federal jurisdiction. See *City of Indianapolis v. Chase National Banks*, 314 U. S. 63 (1941).

In addition thereto, there was an argument made that the defendant was a mere plant facility rather than a common carrier for the Court said in the *Kach* case, page 402:

> "The defendant points out that before a railroad may lawfully operate in interstate commerce it first must obtain a certificate of public convenience and necessity from the Interstate Commerce Commission. It states that the Commission has refused it such a certificate and *has held it to be a mere plant facility of the Steel Company.*" (Emphasis ours.)

Thus, the Court in the *Kach* case clearly rejected the argument that the defendant was a *mere plant facility* and held it to be subject to the Federal Employers' Liability Act. This is precisely the argument now raised by General Electric.

D. The fact that the General Electric Company did not incorporate its railroad as such, should not enable it to avoid its responsibility under the Federal Employers' Liability Act.

The only distinction between the instant case and the *Kach* case is that the Monessen Southwestern Ry. Co. which hauls material for its parent, the Pittsburgh Steel Company, is separately incorporated as a railroad.

The fact that a railroad has been incorporated as such is absolutely irrelevant when the question is whether it is a common carrier. This Court has specifically rejected the corporate character of a transportation agency as a factor in determining whether it is a common carrier. In *U. S. v.*

State of California, 297 U. S. 175 (1936), this Court held that the State of California was a common carrier by railroad under the Federal Safety Appliance Act. The Court said (p. 181):

> "Whether a transportation agency is a common carrier depends not upon its corporate character or declared purposes, but upon what it does * * *."

In this same case the court said (p. 185):

> "The danger to be apprehended is as great and commerce may be equally impeded whether the defective appliance is used on a railroad which is state-owned or privately-owned. *No convincing reason is advanced why interstate commerce and persons and property concerned in it should not receive the protection of the act whenever a state, as well as a privately-owned carrier, brings itself within the sweep of the statute, or why its all-embracing language should not be deemed to afford that protection.*" (Emphasis ours.)

A pertinent paraphrase of this language extremely applicable to this case would be:

> "The danger to be apprehended is as great and commerce may be equally impeded whether the negligence appears on a railroad which is incorporated as a railroad or on a railroad which is not so incorporated. No convincing reason can be advanced why interstate commerce and persons concerned with it should not receive the protection of the Act whenever a non-incorporated railroad as well as an incorporated railroad brings itself within the sweep of the statute, or why its all embracing language should not be deemed to afford that protection."

II. THE DISTRICT COURT AND THE COURT OF APPEALS ERRONEOUSLY GAVE RES ADJUDICATA EFFECT TO AN INTERSTATE COMMERCE COMMISSION DECISION IN DIRECT CONFLICT WITH A PREVIOUS DECISION BY THIS SAME COURT OF APPEALS AND A DECISION BY THIS COURT.

Another important aspect of this case is the treatment of the District Court (adopted by the Court of Appeals) of the decision of the Interstate Commerce Commission in *General Electric v. New York Central & Hudson River Railroad*, 14 I. C. C. 237. The District Court relied upon and held to be all determinative this decision by the Interstate Commerce Commission. The District Court said:

> "All these factors were considered in an application by General Electric Company to the I. C. C. to obtain a rate allowance from a rail common carrier for performing at General Electric Company's Schenectady plant the same type services here performed. General Electric Company v. New York Central & Hudson River Railroad, 14 I. C. C. 237. The Commission there held the defendant's operation to be merely that of a plant facility and not that of a common carrier, and that the General Electric Company was not entitled to a rate allowance for the use of said facilities. That decision was cited with approval by the Supreme Court of the United States in U. S. v. Louisiana & P. R. Co., supra, in pointing out the distinction between plant facilities and spur lines of a common carrier."

The Court of Appeals said:

> "We find ourselves in complete agreement with the view expressed in the able and competent opinion filed by Judge Clary in the District Court, 110 F. Supp. 4, to which we need add nothing."

Yet this same Circuit Court, in an opinion written by one of the same members who sat upon this case, in *Kach v. Monessen Southwestern Ry. Co.*, supra, said with regard to the effect of Interstate Commerce Commissions' decisions (p. 402):

> "The defendant points out that before a railroad may lawfully operate in interstate commerce it first must obtain a certificate of public convenience and necessity from the Interstate Commerce Commission. It states that the Commission has refused it such a certificate and *has held it to be a mere plant facility of the Steel Company.* The defendant urges that these determinations by the Commission are binding upon us and establish that the defendant is not engaged in interstate commerce. It is *unnecessary for us to consider the nature or extent of these determinations by the Commission, however, for we cannot agree that they control the disposition of the case now before us.* The plaintiff was not a party to them. He is entitled to a judicial determination of the question whether the defendant is engaged in interstate commerce within the meaning of the acts upon which he relies without regard to what the Interstate Commerce Commission may have determined in a proceeding of a different nature brought under other statutes." (Emphasis supplied.)

These two opinions by the same Court of Appeals are directly and diametrically opposed to one another. In this case against the General Electric Company the decision of the Interstate Commerce Commission regarding a railroad of the respondent *far removed from the site of the railroad here involved* is given *res adjudicata* effect. While previously this same Court held a decision by the Interstate Commerce Commission involving *the same railroad as was involved in that case* to be *"unnecessary for [the court] to consider"*. (Emphasis ours.)

It is respectfully submitted that this conflict in the deci-

sions of the same Court of Appeals is sufficient to allow certiorari. Indeed, it is evident from a previous decision by this Court that the treatment given the Interstate Commerce Commission decision in the *Kach* case is correct.

This Court has characterized decisions of the Interstate Commerce Commission as being of "negligible value" in interpreting the Federal Employers' Liability Act. In *Washington Railway & Electric Co. v. Scala*, 244 U. S. 630 (1916), this Court said (page 638):

> "It is argued that under the decision in Omaha & C. B. Street R. Co. v. Interstate Commerce Commission, 230 U. S. 324, 57 L. Ed. 1501, 46 L. R. A. (N. S.) 385, 33 Sup. Ct. Rep. 890, the railway of the defendant was a street railroad, and that therefore the defendant was not a 'common carrier by railroad' within the terms of the Act of 1908 as amended. That case dealt with a purely street railway in the streets of two cities, and the decision was that it was not a 'railroad' such as was intended to be placed under the jurisdiction of the Interstate Commerce Commission by the Interstate Commerce Commission Act of 1887 [24 Stat. at L. 379, Chap. 104, Comp. Stat. 1916, §8563]. *The case is of negligible value in determining either the construction of the act we are considering in this case,* or the classification of the defendant, which clearly enough is a suburban railroad common carrier of passengers within the scope of the Federal Employers' Liability Act, * * *." (Emphasis ours.)

This line of reasoning is extremely cogent. For the Interstate Commerce Act regulating carriers performs an entirely different function from that of the Federal Employers' Liability Act. Its function is to regulate among many other things the rates to be charged by railroads. The purpose of the Federal Employers' Liability Act is to protect railroad workers from the hazards of their industry. *Wilkerson*

v. McCarthy, 336 U. S. 53, 68 (1949), where Mr. Justice Douglas said:

> "The Federal Employers' Liability Act was designed to put on the railroad industry some of the cost for the legs, eyes, arms, and lives which it consumed in its operations. Not all these costs were imposed, for the Act did not make the employer an insurer. The liability which it imposed was the liability for negligence. But judges had created numerous defenses—fellow-servant rule, assumption of risk, contributory negligence—so that the employer was often effectively insulated from liability even though it was responsible for maintenance of unsafe conditions of work. The purpose of the Act was to change that strict rule of liability, to lift from employees the 'prodigious burden' of personal injuries which that system had placed upon them, and to relieve men 'who by the exigencies and necessities of life are bound to labor' from the risks and hazards that could be avoided or lessened 'by the exercise of proper care on the part of the employer in providing safe and proper machinery and equipment with which the employee does his work'."

This fundamental error in the effect given to an Interstate Commerce Commission decision is important. The words "common carrier" in the Federal Employers' Liability Act *have never been interpreted by this Court.* Certiorari should be allowed to correct this important error and to decide what factors make a railroad a "common carrier" and thus subject to regulation by this important Act of Congress designed to protect railroad workers.

III. PETITIONER BY THE SUMMARY ACTION OF THE DISTRICT COURT AND THE COURT OF APPEALS HAS BEEN DEPRIVED OF HIS RIGHT TO TRIAL BY JURY.

This Court has consistently upheld the right of railroad workers to a trial by jury on all phases of the Federal Employers' Liability Act. In *Blair v. Baltimore & Ohio R. R. Co.*, 323 U. S. 600 (1945), Mr. Justice Black said *on the issue of negligence*, p. 602:

> "To deprive railroad 'workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of relief which Congress has afforded them'. Bailey v. Central Vermont R. R. Co., 319 U. S. 350, 354."

On the issue of causation, Mr. Justice Murphy said in *Lavender v. Kurn*, 327 U. S. 645, 652, 653 (1946):

> "* * * The jury having made that inference, the respondents were not free to relitigate the factual dispute in a reviewing court. Under these circumstances it would be an undue invasion of the jury's historic function for an appellate court to weigh the conflicting evidence, judge the credibility of witnesses and arrive at a conclusion opposite from the one reached by the jury."

On the issue of the effect of a release, again Mr. Justice Black said:

> " 'The right to trial by jury is a "basic and fundamental feature of our system of federal jurisprudence" '; * * * That it is a 'part and parcel of the remedy afforded railroad workers under the Employers' Liability Act'."

Dice v. Akron C. & Y. R. R., 342 U. S. 359, 363 (1952). See also *Myers v. Reading Co.*, 331 U. S. 477, 485, 486 (1947), which upheld the right of injured railroad workers to trial by jury with reference to the Safety Appliance Act.

Petitioner has stated in that portion of the argument contending that the respondent is a common carrier as a matter of law all of the relevant facts and law. Respondent has so far avoided responsibility under the Federal Employers' Liability Act by failing to incorporate its railroad as a separate entity, but whatever may be the effect of that guise as a matter of law—and we vigorously insist that it should not affect the status of the General Electric Company's railroad as a common carrier—the issue at the least is a doubtful one and, under the above cited law of this Court, such issue must *at least* be submitted to a jury.

All that your petitioner is asking in this phase of the argument is that this Court promulgate the same rule with respect to a jury trial on the issue of whether the respondent is a common carrier as dictated in the above cases on all other issues involved in the Federal Employers' Liability Act. A consistent application of that rule relating to trial by jury requires a reversal of the decision of the Court of Appeals for the Third Circuit in this case.

CONCLUSION.

Under the facts and law, the General Electric Company, in the operation of its railroad was a common carrier. The operations which it performed were distinctly in the nature of the operations performed by a common carrier. In holding that it was not a common carrier, the District Court and the Court of Appeals ignored the specific provision of the Constitution of the Commonwealth of Pennsylvania which makes *all* railroads common carriers. In so holding the District Court and the Court of Appeals gave *res adjudicata* effect to the Interstate Commerce Commission deci-

sion which involved a railroad owned by the General Electric Company in New York rather than the railroad here involved. In deciding in this manner the District Court and the Court of Appeals have handed down a decision in direct conflict with its own decision in *Kach v. Monessen Southwestern R. R. Co.*, supra.

By virtue of these mistakes the petitioner, by the summary action of both the District Court and the Court of Appeals, has been deprived of his right to trial by jury—a right which this Court has consistently upheld on all phases of the Federal Employers' Liability Act.

A writ of certiorari should be granted and the holding of the court below should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1953.

No. 359.

WILLIAM KELLY,

Petitioner,

v.

GENERAL ELECTRIC COMPANY,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

General Electric Company, Respondent, respectfully submits that the above entitled Petition should be denied.

OPINIONS BELOW.

The opinion of the District Court for the Eastern District of Pennsylvania is reported in 110 F. Supp. 4; the opinion of the United States Court of Appeals for the Third Circuit is reported in 204 F. 2d 692.

JURISDICTION.

The jurisdiction of this Court is invoked under the Act of June 25, 1948, c. 646, 62 Stat. 928 (28 U. S. C. A. Section 1254).

COUNTER-STATEMENT OF THE QUESTIONS INVOLVED.

In an action for personal injuries against a manufacturing company under the Federal Employers' Liability Act, did the Court below err in entering summary judgment for the Respondent where, in accordance with uncontradicted evidence and the findings of the trial Judge, the Respondent is not a common carrier by railroad engaged in commerce between the states, since it merely operated 2.17 miles of private trackage inside its own plant, moving its own goods to and from the sidings of the Pennsylvania Railroad within its plant enclosure?

STATUTES INVOLVED.

45 U. S. C. A. Section 51 (Federal Employers Liability Act).

Art. 17, Sec. 1. Constitution of Commonwealth of Pennsylvania.

COUNTER-STATEMENT OF THE CASE.

The only plausibility in Petitioner's Statement of Facts has been achieved by his misstatements and omissions of essential facts. Although the facts are clearly set forth in Judge Clary's able and comprehensive Opinion, we feel it our duty to point out to this Court the most flagrant of Petitioner's misstatements.

At the very beginning of his Statement of Facts (p. 4), it is said that Plaintiff "was run down by a switch engine owned by the Defendant General Electric Company on railroad tracks *near* the General Electric plant" * * * and at the time of the accident Defendant * * * "owned and operated railroad trains over its tracks at the scene of the accident." The fact is undisputed, however, that the accident occurred *within the Defendant's plant enclosure,* on

its private tracks maintained by Defendant solely as a plant facility for its own purposes.

• • •

In the second paragraph of his Statement of Facts, Petitioner states (p. 4) that the incoming cars at Respondent's plant include cars "which have only part of their load consigned to them. *Thus, the remaining portion of the car contains goods of other consignees.*" From this, Petitioner would imply that in switching such cars Respondent performed a transfer service for such "other consignees." Apart from the fact that Respondent's yardmaster testified without contradiction that this had happened but once, to his knowledge, in 26 years (99a), "several years ago," even in that one case Respondent performed no transportation service for such other consignee, but merely shifted a car containing less than carload lots consigned to it and others, to its own unloading platform, removed its own goods and put the car back on the Pennsylvania Railroad siding.

• • •

Petitioner further alleges (p. 5):

> "The General Electric Company also was permitted to construct its railroad across the city streets in the City of Philadelphia. This it could not do under Pennsylvania law unless it was a common carrier."

From this Petitioner would apparently have it appear that since Respondent had constructed tracks in the bed of a public street, it must be a common carrier, because in Pennsylvania only a common carrier can exercise the right of eminent domain. Under the uncontradicted facts, however, *the tracks were not laid in the exercise of the power of eminent domain, but with the express permission of the City of Philadelphia,* granted by Ordinance approved July 23, 1924 (Appendix, p. 135a). Furthermore, by ordinance approved May 4, 1926 (Appendix, p. 148a), 68th Street between Elmwood Avenue and the Pennsylvania Railroad was

stricken from the City Plan, thus permitting General Electric Company to construct not only its railroad tracks, but also an industrial plant with an iron fence completely enclosing it, across the former street.

• • •

Petitioner further states that under an agreement of 1925 between Respondent and the Pennsylvania Railroad, Respondent:

> "In the operation of its railroad agreed to conform, as a railroad must, with the requirements of the rules and regulations of the Interstate Commerce Commission with respect to the construction, maintenance and operation of the subject tracks." (p. 5)

This conclusion, which Petitioner sets forth as a fact, is derived by him from a standard paragraph in the Pennsylvania Railroad's printed form of siding agreement (133a), which provides as follows:

> "The Industry further agrees that the provisions of State and Federal statutes, as well as the rules, regulations and requirements of the Interstate Commerce Commission, or of the appropriate State Commission, with respect to construction, maintenance and operation of the Industries said sidetrack shall be complied with."

If Petitioner's interpretation of the effect of this clause were to be accepted, every industry which has a siding agreement with the Pennsylvania Railroad would be a common carrier.

• • •

Nowhere in his Statement of Facts or elsewhere does Petitioner mention the fact that on March 28, 1949, a week after the accident, Petitioner and Respondent entered into an agreement for workmen's compensation (reproduced at 28a-31a), which was duly approved by the Bureau of Workmen's Compensation at Harrisburg, Pennsylvania. Re-

spondent has regularly paid weekly compensation pursuant thereto, and has also paid medical expenses in amounts far in excess of the legal requirements (27a).

• • •

In addition to the facts stated by Judge Clary in his Opinion, the attention of this Court is directed to the Plan of the General Electric Company plant, set forth at p. 41a of the Record. This Plan discloses that the tracks are entirely within the plant enclosure, and that the tracks *do not* extend across any streets. The two tracks next to, but inside the fence, are on land owned by the Pennsylvania Railroad Company, and are the Pennsylvania Railroad sidings referred to in the Record and in the Opinion. It is on these tracks that General Electric Company picks up inbound cars and places outbound cars, so that the General Electric engines and crews operate entirely within the plant enclosure.

ARGUMENT.

1. The General Electric Company Does Not Operate a "Railroad" and Is Not a Common Carrier.

On page 7 Petitioner states that it is not contended that General Electric Company, with all its vast resources and operations, is a common carrier, but merely that in its railroad operations it is a common carrier.

Clearly, it requires no argument to demonstrate that respondent is not a railroad company within the meaning of Article 17, Section 1 of the Pennsylvania Constitution, providing that "all railroads and canals shall be public highways, and all railroad and canal companies shall be common carriers."

The test as to whether a company operating a railroad is a common carrier is that set forth by this Court in the *Tap Line Cases, U. S. v. Louisiana & P. R. Co.*, 234 U. S. 1, 24:

> "It is the right of the public to use the road's facilities and to demand service of it, rather than the extent of its business which is the real criterion determinative of its character."

Despite the general statement on page 12 of the present Petition, there is no serious contention that the public has the right to demand railroad services by General Electric Company in its plant, or to demand the use of the General Electric's tracks in the plant. Obviously, if any such right existed in the present case, then every industrial concern having private tracks within its plant, would be a common carrier.

The attempt by Petitioner to show that Respondent coordinated its rules and practices relative to safety with those of the Interstate Commerce Commission was wholly without success, the witness saying (123a, 124a): "We have nothing to do with the Interstate Commission" (See also page 127a). Similarly, the fact that by its siding agreement with the Pennsylvania Railroad in 1925 (133a) Re-

spondent agreed to comply with the rules, regulations and requirements of the Interstate Commerce Commission or the appropriate State Commission with respect to the construction, maintenance and operation of its sidetrack, in no way made the Respondent a common carrier engaged in interstate commerce.

As stated by Judge Clary in his Opinion (140a-141a), "a common carrier has been defined generally as one who holds himself out to the public as engaged in the business of transportation of persons or property from place to place for compensation, offering his services to the public generally." Judge Clary goes on to review the distinctive characteristics of a common carrier, and points out that Petitioner has made no showing that Respondent has any such characteristics. Nor has Petitioner made any such showing here. The fact is that there is no evidence which would support a finding that Respondent is a common carrier.

Petitioner argues strenuously that a Final Judgment should not have been rendered against him without a Jury trial. However, such a summary judgment is authorized by Rule 56 (c) of the Federal Rules of Civil Procedure, and is perfectly proper where, as here, there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Although Petitioner and Respondent differ as to the conclusion to be drawn from the uncontradicted facts, clearly there is no issue of fact here such as must be determined by a Jury; nor can Petitioner create a jury question by misstating, misconstruing or omitting to consider uncontradicted evidence, the truth of which he does not question.

2. The Respondent Has Not Used its Railroad Tracks for the Transportation of Merchandise Belonging to Others.

Petitioner bases the above contention first on the ground that inbound shipments to Respondent in less than carload quantities contain merchandise belonging to others,

which Respondent hauls to its unloading platform and back to the Pennsylvania Railroad.

Apart from the fact that only one such instance apparently occurred in 26 years, this service, even if performed more often, would not constitute transportation of such merchandise for such other consignee, since all General Electric did was to put the car back where it got it. Admittedly, Respondent never charged another consignee for transportation service. What General Electric did was done solely for its own convenience in loading or unloading its own property, and added nothing to the service rendered by the common carrier to the other consignees.

The other circumstance relied on by Petitioner is that outgoing shipments are made F. O. B. the plant of the Respondent. This fact, however, by no means has the significance which Petitioner claims for it.

The billing F. O. B. did not pass title to the goods until they were delivered to the Pennsylvania Railroad Company. They were not the goods of the consignee when loaded on the cars within Respondent's plant any more than they were when packaged within its plant. The passage of title by reason of billing F. O. B. applies only *upon relinquishment of control* by the delivery of the consignment to an independent carrier, and not where the transporting agent is an employee of the consignor. As Judge Clary said, irrespective of whether title technically passed when the goods were loaded within the General Electric plant or by delivery to the Pennsylvania Railroad by General Electric outside its plant, the same situation doubtless obtains in the case of every plant facility.

See *Wenger v. Barnhart*, 55 Pa. 300;
Lewis v. Farmers Grain & Mill Co., 52 Cal. App. 211;
U. S. v. Andrews, 207 U. S. 229.

3. The Petitioner Refers to No Circumstance Supporting the Allowance of the Writ.

(a) There Is No Decision by Any Circuit Court of Appeals in Conflict With the Present.

The decision in *Kach v. Monessen Southwestern Ry. Co.*, 151 F. 2d 400 (C.A. 3, 1945), was by the same court which decided the case at bar, the opinion being rendered by Judge Maris, one of the three judges who heard and decided the present case. Nor is that case in conflict with the same court's present decision.

The question there was whether the defendant, which by its answer "admitted that it was engaged in doing business as a common carrier by railroad for hire under the laws of Pennsylvania," was engaged in interstate commerce so as to subject it to damages under the Federal Employers' Liability Act for injuries to a locomotive fireman. Defendant, a wholly owned subsidiary of the Pittsburgh Steel Company, operated a railroad having a main track 7½ miles in length, connecting the various works of the steel company with the Pittsburgh & Lake Erie and the Pittsburgh & West Virginia Railroad Companies, for which services defendant charged the Steel Company. It appeared that shortly before the accident defendant had moved a number of loaded cars consigned to the Steel Company from points outside Pennsylvania and a number of cars from its plant consigned to points outside Pennsylvania, and that the injured fireman had actually participated in all these movements. The Court held that:

> "it was not necessary for the plaintiff to show that either he or the defendant was engaged in the movement of an interstate shipment of freight at the very moment of injury. The evidence clearly established that the defendant habitually participated in the movement of interstate shipments of freight and that the plaintiff customarily assisted as a locomotive fireman in those movements." (p. 402)

In the case at bar, the Respondent did not as did the Monessen Southwestern Railroad, itself act as a railroad common carrier. It merely placed its own goods on the Pennsylvania Railroad siding. The amendment of August 11, 1939, to Section 1 of the Federal Employers' Liability Act, relied on by the court in that case, applies only to the employees of a "carrier," which Respondent clearly is not.

(b) The Court Below Has Not Decided an Important Question of Local Law in a Way Probably in Conflict With Applicable Local Decisions.

The decision of the Pennsylvania Superior Court in *Lehigh Navigation Coal Co. v. Pennsylvania Utility Commission et al.*, 133 Pa. Superior Ct. 67 (1938), does not at all hold what appellant claims for it. In that case O'Donnell Brothers, a retail coal dealer, had made an agreement with Lehigh Navigation Coal Company, a wholesale dealer, under which a sidetrack was constructed from O'Donnell's yard over the property of the Lehigh Company, connecting with the tracks of the Pennsylvania Railroad, and O'Donnell was given a license to use this sidetrack. When O'Donnell ceased to buy all their coal from the Lehigh Company, the latter refused to permit the use of the sidetrack on its property. A Pennsylvania statute (Section 406 of the Public Utility Law of 1937, 66 P. S. Section 1176) gave to any owner or operator of a private sidetrack the right to have a switch connection with the line of any adjacent railroad under certain conditions. The court held that the sidetrack "when connected with the Pennsylvania Railroad, constituted a part of the railroad's transportation facilities in the same manner as if constructed by the railroad company itself." "Appellant (the Lehigh Company), by its own conduct, clothed the property in question with the character of a utility facility, subject to public use upon payment of reasonable compensation; it voluntarily made its property a utility facility."

"The real question in the case," said the court, "is whether the titles of the Public Service Company Law and the Public Utility Law give sufficient notice of the particular ramifications of the subject," to comply with the requirement of Art. 3, Section 3 of the Pennsylvania Constitution.

There was there no contention that O'Donnell was a railroad or a common carrier. All that the case held was that the Lehigh Company, by permitting the construction of a sidetrack across its land to connect O'Donnell's property with that of the Pennsylvania Railroad made this sidetrack, under the Pennsylvania law, a part of the railroad's utility facilities. In the case at bar the General Electric Company built and used the sidetrack solely for its own benefit on its own property; nor could its construction and the connection of it with the railroad give anyone other than the General Electric Company the right to use it.

The court below has not decided an important question of Federal law which has not been but should be settled by this Court. The United States Supreme Court reports are full of decisions covering every phase of the problem of when a company is a common carrier by railroad engaged in interstate commerce.

For the foregoing reasons, the petition for a writ of certiorari should be dismissed.

Respectfully submitted,

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